IN THE

Supreme Court of the United States

October Term, 1976

NO. 76-205

THE HONORABLE SHIRLEY CHISHOLM,
NATIONAL ORGANIZATION FOR WOMEN,
and OFFICE OF COMMUNICATION OF
THE UNITED CHURCH OF CHRIST,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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**PETITION FOR A WRIT OF CERTIORARI
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The Honorable Shirley Chisholm, the National Organization for Women, and the Office of Communication of the United Church of Christ, Petitioners, respectfully hereby pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 12, 1976.

OPINIONS BELOW

The opinion of the Federal Communications Commission ("FCC") was issued on September 30, 1975 and is reported at 55 FCC2d 697. (DNC App. 1a).[1] The opinion of the Court of Appeals, which upheld the FCC action by a divided vote, was issued on April 12, 1976 and is not yet reported. (DNC App. 23a). The order denying rehearing was entered on May 13, 1976. (DNC App. 127a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the FCC exceeded its statutory authority when it ruled that if a licensee chooses to broadcast live and complete coverage of a debate between fewer than all the legally qualified candidates in an election, without having helped arrange that debate, or the press conference of a single candidate, such coverage is exempt as a matter of law from the equal opportunities provision of Section 315(a) of the Communications Act, as amended, 47 U.S.C. §315(a), as "on-the-spot coverage of bona fide news events."

2. Whether the FCC's new determination as to what constitutes "on-the-spot coverage of bona fide news events" required compliance with the Administrative Procedure Act, 5 U.S.C. §553, insofar as public notice and an opportunity for public comment were necessary.

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[1] On July 23, 1976 the Democratic National Committee ("DNC") filed a petition for a writ of certiorari with this Court, *Democratic National Committee v. Federal Communications Commission, et al.*, No. 76-101, which contains as its appendices a copy of the relevant opinions issued by the FCC and the Court of Appeals. Petitioners will refer to those appendices as (DNC App.).

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. §315(a), provides, in relevant part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in use of such broadcasting station. . . . Appearance by a legally qualified candidate on any —
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

STATEMENT OF THE CASE

This case concerns a seminal ruling by the FCC which the majority panel of the Court of Appeals stated was "perhaps the most important interpretation of the equal time provisions . . . which has arisen in the past decade." (DNC App. 25a). The FCC reversed two long-standing prior rulings when it decided that if a licensee chooses to provide live and complete coverage of a debate between fewer than all legally qualified candidates for an office, the remaining candidates are not entitled to equal opportunities so long as the broadcaster acted in good faith and did not take part in the arrangements for the debate ("non-studio debates").

Similarly, by overruling another previous decision, the FCC determined that henceforth, a station may broadcast any candidate's press conferences live and in their entirety without incurring any obligation to afford equal opportunities to other legally qualified candidates for the same office.

The FCC rulings came as a direct result of two petitions for declaratory relief filed with the Commission. In its petition, the Aspen Institute Program on Communications and Society argued that the results reached in *Goodwill Stations, Inc.*, 40 FCC 362 (1962), and *Robert L. Wyckoff*, 40 FCC 366, *recon. den.* 40 FCC 370 (1962), were inconsistent with Congressional intent in that they refused to exempt non-studio debates from the requirement of equal opportunities. Similarly, the petition of the Columbia Broadcasting System, Inc., stated that a prior decision in *Columbia Broadcasting System*, 40 FCC 395 (1964), contravened Congressional directives in that licensees who broadcast presidential press conferences were required to afford equal opportunities to other legally qualified candidates for the Presidency; significantly, this petition argued that press conferences of candidates for offices other than the Presidency should still remain subject to the rule of equal opportunities.

The Commission gave no official notice of these petitions, nor did it request comments on their merits. When word that Commission action was imminent reached the trade press, the DNC and Petitioners The Honorable Shirley Chisholm and National Organization for Women filed comments opposed to the requests for declaratory relief. Moreover, these Petitioners argued that the FCC should engage in rulemaking in order to allow interested persons and candidates opportunity to comment. Letters urging rulemaking were filed by Citizens for Reagan, Jimmy Carter, the Congressional Black Caucus and the League of Women Voters.

On September 30, 1975, a divided Commission released its decision, voting 5-2 to overrule *Goodwill, Wyckoff,* and *Columbia Broadcasting System* as having been "based on what now appears to be an incorrect reading of the legislative history of the newscast exemptions and subsequent related Congressional action." (DNC App. 7a).[2] The Commission majority also determined that "as a matter of policy" its action "serves the public interest." (DNC App. 10a). Henceforth, the majority ruled the exemption for "on-the-spot coverage of bona fide news events" in Section 315(a)(4) would apply to live coverage in the entirety of non-studio debates between less than all the candidates for a particular office and of press conferences held by any candidate for any national, state or local office, *unless* a complaining candidate could prove that the broadcaster intended to favor the opponent who was covered. (DNC App. 8a-9a).

Commissioner Lee, who has been on the Commission continuously since 1953, dissented on the ground that

> the majority has sidestepped the very purpose of Section 315 of the Communications Act — that all qualified candidates for a public office be given equal opportunities to present their images and positions to voters via broadcast media. (DNC App. 17a).

He noted that the majority

> has created a loophole to Congress' intent that allows grossly unbalanced coverage of the political activities of political opponents . . . . (*Id.*)

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[2]That the Commission felt that its ruling was required by legislative history is further borne out by reference to the concurring opinions of Commissioners Quello (DNC App. 21a), Washburn (DNC App. 22a) and Robinson (DNC App. 22a).

Commissioner Lee concluded that

> [a] change in policy of this magnitude affects the heart of our political system. At a minimum, it should be made in the context of a rulemaking proceeding . . . . The preferable procedure, however, is to let Congress define the policy. (*Id.*).

Commissioner Hooks issued a separate dissent, in which he argued that "the majority has swept aside the clear intent of a vital portion of Section 315 [footnote omitted] which was enacted by Congress . . . ." (DNC App. 17a). He noted that the standard of bona fides established by the majority focused on a "matter of [broadcaster] intent [,] and objective proof of favoritism is all but impossible." (DNC App. 19a). Commissioner Hooks concluded that, at the least, a rulemaking proceeding "would have helped open our eyes to the drastic ramifications of our seemingly limited exemptions." (DNC App. 20a).

Upon a petition for review filed pursuant to 47 U.S.C. §402(a), a divided panel of the U.S. Court of Appeals for the D.C. Circuit affirmed the Commission on April 12, 1976. The thrust of the majority opinion was that although the legislative history behind Section 315 appeared to be "inconclusive" (DNC App. 26a), the Court should defer to the Commission's interpretation of the statute. (*Id.*) Judge Wright dissented, arguing that the Commission exceeded its statutory authority by exempting non-studio debates and press conferences from the requirements of equal opportunities and by delegating overbroad authority to licensees through the establishment of broadcaster intent as the criterion of the bona fides for the "on-the-spot" news exemption. He further asserted that the Commission's refusal to give notice of its proposal and ask for public comments violated the Administrative Procedure Act.

A timely petition for rehearing and/or rehearing *en banc* was filed and was subsequently denied on May 13, 1976.

REASONS FOR GRANTING THE WRIT

I. THE ERRONEOUS INTERPRETATION OF THE "ON-THE-SPOT COVERAGE OF BONA FIDE NEWS EVENTS" EXEMPTION TO THE EQUAL OPPORTUNITIES PROVISION OF SECTION 315(a) CONCERNS AN IMPORTANT ISSUE WITH BROAD RAMIFICATIONS.

As the Court of Appeals majority candidly admitted, this case concerns perhaps the most important interpretation of the equal opportunities rule in the past decade. (DNC App. 25a). It involves the fundamental principle, which has been part of our scheme of broadcasting since 1927, that all legally qualified candidates for a particular office should be afforded equal treatment by licensees. Even when Congress enacted the four current exemptions to the requirement of equal opportunities in 1959, it strongly reemphasized its belief in the general principle[3] — a principle now eroded by the Court of Appeals and Commission decisions.

Several Congressional concerns expressed in 1959 give adequate testimony to the importance of maintaining faithful adherence to the concept of equal opportunities through a cautious application of the carefully carved exemptions to the general rule. Congress was aware of the fact that a licensee could help elect the candidate of its choice by exhibiting favoritism in its programming, especially at the

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[3] S. Rep. No. 562, 86th Cong., 1st Sess. at 8 (1959). *See also* 105 Cong. Rec. 5399 (Sen. Thurmond) and 7407 (Sen. Hartke) (1959).

local level.[4] There was also the long-standing concern that it was unwise to permit a powerful, nationwide industry of public trustees to have unbridled discretion as to coverage to be afforded candidates and their issues since even if such discretion were exercised in good faith, programming policies could determine the outcome of an election.[5] And, although the 1959 Congress was farther removed from the period of the Bull Moose Party and the Progressive Party than the 1927 Congress which originally adopted the equal opportunities provision, this later legislative body showed an equal solicitude for the importance of third-party and minority-party candidates whose access rights it refused to sacrifice.[6] Significantly, Congress also knew that equal opportunities were imperative if an incumbent's hold on the media was to be mitigated, thereby giving a challenger a greater chance to win an election.[7] And, in what is perhaps the greatest attestation to the importance of Section 315(a), Congress heard from the Commission itself, which admitted that the determination of what constitutes a candidate "use" of the broadcast media so as to give rise to equal treatment "involves a fundamental matter of legislative policy for the judgment of Congress"[8] since it strikes at the core of our political system.

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[4] *Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Subcomm. on Communications of the Sen. Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. at 51-52 (1959) (hereafter, *1959 Senate Hearings*). *See also* 105 Cong. Rec. 14440 (Sen. Pastore), 14450-51 (Sen. Engle), 17778 (Rep. Harris), 17829 (Sen. Engle), and 17831 (Sen. Scott) (1959).

[5] E.g., 105 Cong. Rec. 14443 (Sen. Holland) (1959).

[6] *1959 Senate Hearings* at 260; 105 Cong. Rec. 14442 (Sen. Engle) and 16242 (Rep. Stratton) (1959).

[7] E.g., 105 Cong. Rec. 14443 (Sen. Holland) (1959).

[8] *Hearings on H.R. 5389, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. at 5, 12, 15, 104 (1959) (hereafter, *1959 House Hearings*); *1959 Senate Hearings* at 67, 71, 73, 76, 90.

Not only were these general principals of overriding importance to Congress in 1959, but our legislators spent long hours discussing the particular relevance of the equal opportunities provision to debates. While the Court of Appeals majority found this history to be inconclusive, even in the face of the Commission's determination that the legislative history mandated an overruling of *Goodwill* and *Wyckoff*, Judge Wright's dissent clearly focuses on the fact that objections to a specific refusal by the Congressional leadership to include an exemption for debates were met with "the expression of concern . . . that the inclusion of a wide range of program types . . . would leave little vitality in the equal time requirement and give broadcasters too much discretion." (DNC App. 74a-75a).[9] The importance of the debates question, particularly at the national level, is illustrated by the continual Congressional attention it received in subsequent years when, contrary to Commission assertions, legislative activity confirmed that Congress did

[9]The Senate Subcommittee considered four bills to amend Section 315, two of which specifically included a debate exemption. (DNC App. 66a). The Subcommittee was repeatedly informed that debates could not be broadcast under the bills lacking a debate exemption. *1959 Senate Hearings* at 101-105. Notwithstanding, the Subcommittee, which drafted its own bill, did not include a provision for debates, although it did include an exemption for panel discussions. On the floor, objections were raised to panel discussions because they, like debates, would pose too great a danger for abuse. (DNC App. 68a-69a). By voice vote, the panel discussion exemption was eliminated. Similarly, the House Subcommittee considered several bills containing specific exemption for debates, but ultimately reported out Chairman Harris' bill which did not include a debate exemption. Rep. Harris explained his deliberate decision not to include the exemption because debates "had connotations which go far beyond matters of this kind" and because the term was too broad. *1959 House Hearings* at 2, 87-88. And, as in the Senate, the Subcommittee members were told by witnesses that the key weakness of the Harris bill was the failure to include a debate exemption; yet they refused to relent. *1959 House Hearings* at 129, 146, 165, 171, 181, 190. Nobody in either the Subcommittee or on the House floor suggested that coverage of debates, in or out of studio, would not give rise to equal opportunities under the Harris bill.

not intend to exempt debates as "on-the-spot coverage of bona fide news events."[10]

Unlike the issue of debates, press conferences received little attention from Congress until the post-1959 period

[10]In 1960 Congress suspended Section 315 for Presidential and Vice-Presidential nominees and, although the legislation did not specifically refer to the debate format, it was precisely to pave the way for the great Kennedy-Nixon debates that the law was changed. *Hearings on S. 3171 Before Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. at 3, 31, 184, 292 (1960) (hereafter, *1960 Senate Hearings*). Witnesses before the Senate Subcommittee unanimously testified that debates could not be held without the suspension, and no distinction was drawn between debates sponsored by broadcasters or those arranged by third parties. *1960 Senate Hearings* at 7, 188, 194, 234, 272. *See also* 106 Cong. Rec. 14474 (Sen. Pastore) (1960).

Congressional hearings in later years also discussed a series of proposals to amend Section 315(a) so that debates could be covered without the need to provide equal opportunities to non-participating legally qualified candidates. E.g., *Hearings on S. 204, S. 2035, S. 3434, S.J. Res. 193, S.J. Res. 196, S.J. Res. 209 Before Senate Subcomm. on Communications of the Senate Commerce Comm.*, 87th Cong., 2d Sess. at 44 (1962), wherein the President of CBS noted that the upcoming Nixon-Brown debates, which formed the basis for the now-overruled *Wyckoff* decision, were not covered under any exemptions to Section 315(a); *Hearings on H.J. Res. No. 247 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. (1963); *Hearings on S. 251, S. 252, S. 1696 Before the Subcomm. on Communications of the Senate Commerce Comm.*, 88th Cong., 1st Sess. (1963); *Hearings on S. 1548, S. 1859, S. 1926, S. 2090 and S. 2128 Before the Subcomm. on Communications of the Senate Commerce Comm.*, 90th Cong. 1st Sess. at 153 (1967), wherein the President of NBC indicated that debates could not be broadcast under the current law without providing equal opportunities; 114 Cong. Rec. 30232 (1968) (Reps. Pepper, Staggers, Ottinger); *Hearings on H.R. 8627, H.R. 8628 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971) (hereafter, *1971 House Hearings*); *Hearings on S. 1, S. 382, S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. (1971).

(continued)

when they became a more potent campaign tool. Furthermore, as Judge Wright noted in his dissent,

> candidates' press conferences were not discussed by Congress in 1959 because they are so clearly within the core of Section 315's purpose — a purpose reaffirmed in 1959 — that the possibility that they might or should be exempted by the amendatory legislation was not deemed worthy of mention. (DNC App. 85a).

Judge Wright placed candidate press conferences in the same category as a set political stump speech or a staged political event which are the clearest examples of a candidate "use" of a broadcast facility. (DNC App. 86a-87a). The press conference, particularly that of an incumbent President, has been noted by commentators more for its powerful impact as a staged production than as a source of information or news.[11]

In short, the plethora of Congressional concern with debates, specifically, and with press conference-type activities of politicians, generally, is the strongest indication that the Commission must be careful not to exceed its statutory authority in interpreting and administering Section 315(a).[12] Nor, in this election year especially, are these concerns of only theoretical proportions.

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[10](continued)

The Court of Appeals majority accords little weight to the subsequent legislative history of the 1959 amendments to Section 315(a), stating that "attributing legal significance to Congressional inaction is a dangerous business." (DNC App. 48a). However, as asserted by Judge Wright, "[a]dministration of the equal time requirement is, naturally, an area of great concern to the elected politicians in Congress," and hence "some persuasive weight" must be accorded to events after 1959. (DNC App. 80a).

[11]G. Reedy, *Twilight of the Presidency* (New American Library, 1970) at 162, 165; N. Minow, J. Martin, L. Mitchell, *Presidential Television* (Basic Books, 1973) at 40-41.

[12]Ironically, by administrative fiat the Commission has accomplished what it has been asking Congress to do for the past several years, in-

(continued)

At the national level, there is currently an effort to arrange for a debate between the Democratic and Republican nominees for President to be covered by the television networks. Although independent candidate Eugene McCarthy, who has qualified for a position on the ballot in a large number of states, is not to be invited to participate, the networks have shown no reluctance to cover the debate.[13] In fact, there is solid reason to believe that even where pre-election polls indicate that a non-major party candidate for President or any other office would receive as much as 25 percent of the popular vote, licensees will not treat them equally with Democratic and Republican candidates.[14] The situation at the local level is, of course, less visible and more uncertain, though Congress forsaw the potential for abuses to be greater there.

As for press conferences, they have injected a powerful new ingredient into the success formula for incumbent candidates. During the Presidential primaries, the incumbent President obtained virtually open access to the media for press conferences and other formats, locally and nationally, to the severe detriment of his challenger.[15] On May 16, 1976, just two days before the crucial Michigan primary, the incumbent received wide broadcast exposure of a press

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[12](continued)
cluding in 1975. (DNC App. 60a-61a). *See Citizens Communications Center v. Federal Communications Commission*, 447 F.2d 1201, 1204, n. 5 (D.C. Cir. 1971) and Part II, *infra*.

[13]"Pressing for Debate Between the Candidates," *The Washington Post* at E-1 (August 3, 1976). One of the major arguments against suspending Section 315(a) in 1968 was that George Wallace, like McCarthy in 1976, would lose his right to equal treatment. *See* 114 Cong. Rec. 30218 (Rep. Andrews), 30219 (Rep. Latta),, 30232 (Rep. Pepper), 30236 (Rep. MacDonald), 30240 (Rep. Buchanan) and 30241 (Rep. Edwards) (1968).

[14]*1971 House Hearings* at 162-64, 173, 182.

[15]*See*, e.g., *Broadcasting*, Sept. 15, 1975 at 28, February 16, 1976 at 21, March 15, 1976 at 19, and April 19, 1976 at 74.

conference held at a Michigan airport. Although the bulk of the press conference consisted of answers to why he should be selected over his opponent, under the Commission's ruling the challenger was not entitled to a minute of time in response.

If the impact of the Commission's decision is so devastating upon well-financed and better-known independent or non-major party candidates or challengers within the major parties, its effect portends a greater setback for minority and female candidates who decide to mount campaigns against incumbents. These persons traditionally have had the most difficult time obtaining media exposure, despite the seriousness of their candidacies, because their initial power base is inherently limited.[16] Now, their voices probably will never be heard since the access rights which Congress sought to protect under Section 315(a) have been eliminated by administrative fiat. The Court of Appeals majority opinion did not even address these concerns, while the Commission stated that although "the opportunity for abuse may exist at the less visible political office level," Congress clearly intended by adopting the 1959 exemptions to assume this risk. (DNC App. 11a-12a).

In addition to having an enormous impact on the planning of candidate media campaigns from the smallest hamlet to the national level, the Commission's ruling affects every viewer and listener in America. In *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 369, 390 (1969), this Court stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." The Court recognized that neither Congress nor the Commission could abridge "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and ex-

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[16]Cf. *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (D.C. Cir. 1966), wherein the licensee refused even to sell airtime to a black candidate.

periences . . . ." *Id.* In light of the extensive and powerful impact of the broadcast media, which reaches into every home, a public trustee can find "no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." 395 U.S. at 392. This Court's reference to these general principles is a further indication of the importance of administering our broadcasting scheme with due regard for the protection of the public. Yet, by giving licensees virtually unbounded discretion to cover non-studio debates and press conferences as long as they act in "good faith," the Court of Appeals and the Commission have turned these important principles on their head. They have taken a carefully balanced set of Congressional objectives and distorted them by ignoring those concerns which make it clear that the statutory provision for equal opportunities was not intended by any means to provide licensees with *carte blanche* in the area of political candidate "uses" of the medium.[17]

In view of the enormous importance of the statutory question decided by the Court of Appeals, its effect on literally thousands of local, state and national candidates, its impact on members of the public as viewers and listeners, and its significance in the administration of a statutory scheme carefully established and continually reviewed by Congress, the erroneous decision of the Court

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[17]As Judge Wright so ably pointed out, the Commission's decision has created an exemption for "on-the-spot coverage of bona fide news events" which effectively makes the other three exemptions superfluous (DNC App. 99a) and which swallows the rule of equal opportunities by effectively repealing it. (DNC App. 125a). *See also* Commissioner Hooks' dissent. (DNC App. 20a).

Moreover, while the Court of Appeals majority believed that the Commission was increasing broadcaster discretion by disengaging the agency from involvement in news judgments, the fact is that the new "good faith" standard that has replaced the more objective test now requires the Commission to scrutinize broadcaster intent every time an equal opportunities complaint is filed.

of Appeals should be reviewed and reversed as soon as possible.

II. THE REFUSAL TO ENGAGE IN RULEMAKING, THROUGH OFFICIAL PUBLIC NOTICE OF THE PROPOSED CHANGES AND AN INVITATION FOR COMMENT, CONFLICTS WITH AND MISAPPLIES PRINCIPLES SET FORTH BY THIS COURT.

The Court of Appeals majority refused to order the Commission to engage in rulemaking, pursuant to the Administrative Procedure Act, 5 U.S.C. §553, which guarantees official public notice of the proposed action and an opportunity for public comment. Although implicitly admitting that the Commission had changed long-established rules (DNC App. 55a-56a)[18] via a declaratory judgment, it thoroughly misconstrued three of this Court's prior decisions.

The Court of Appeals majority read *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974), as giving the Commission authority to act without informal rulemaking. However, as Judge Wright explained in his dissent, that case "leaves open the question" of whether the Commission should have proceeded via rulemaking when it held that candidate debates and press conferences are exempt under Section 315(a)(4) from the equal op-

[18]The Commission's order, reversing three long-standing decisions, reinterpreting Congressional intent, and articulating new standards and policy to be applied to every future candidate, constitutes the issuance of a "rule" defined by the Administrative Procedure Act as "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. §551(4).

portunities rule. (DNC App. 112a).[19] Moreover, this Court has provided guidance in *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947), wherein it stated:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct . . . . The function of filling in the interstices of the [relevant] Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. 332 U.S. at 202.[20]

Unlike other Courts of Appeals which have noted the "rather pointed hint" in *Chenery*, e.g., *National Labor Relations Board v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966), the majority relied on *Chenery* to defer to the Commission's action.

Most importantly, however, the majority has essentially ignored the opinions in *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), wherein six Justices asserted that agencies are bound to follow rulemaking procedures set forth in the Administrative

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[19]The *Bell Aerospace* decision was a narrow holding that the NLRB was not bound to engage in rulemaking on the specific question of whether the buyers of a particular company were "managerial employees" and hence were not covered by the National Labor Relations Act. This Court did not reach the question of whether the agency would have to use rulemaking to adopt a new general standard regarding coverage of managerial employees under the NLRA. It is that broad question of statutory interpretation and policy that is analogous to the Commission's ruling in the present case, which creates broad and sweeping exemptions to the equal opportunities rule and new standards for applying those exemptions.

[20]This Court used *Chenery* to explain three situations in which adjudication, rather than rulemaking, would be appropriate, none of which is applicable to the instant case. 332 U.S. at 202-203.

Procedure Act when making statements of broad policy and establishing rules of general applicability to future cases. A plurality opinion for the Court stated:

> The rulemaking provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. [Citation omitted]. They may not be avoided by the process of making rules in the course of adjudicatory proceedings. 394 U.S. at 764.[21]

Two dissenting Justices likewise urged that the promulgation of a rule without engaging in rulemaking proceedings was improper.[22]

The majority Court of Appeals decision apparently takes comfort in the assumption that rulemaking would achieve little in this case. (DNC App. 56a-57a). However, as Judge Wright noted, in view of the impact of the Commission's decision upon thousands of candidates in local races, the need for the Commission to have educated itself about the effect of its new standards on political minorities, and the absence of sufficient facts for formulating more precise guidelines for the exercise of broadcaster discretion, a rulemaking proceeding would have been the appropriate mechanism for overruling the decade-old precedent. (DNC App. 117a-118a). Furthermore, the majority failed to consider that only through rulemaking could the Commission

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[21]The plurality stated that the NLRB had improperly bypassed required rulemaking procedures when it adopted a union election list rule in a prior adjudicatory proceeding. Although finding the rule invalid, the Justices voted to uphold the specific order to the company to furnish the information required under the rule, reasoning that it was a valid exercise of the agency's discretion in an individual case to ensure a fair choice of collective bargaining representatives.

[22]The two dissenting Justices agreed that rulemaking was necessary, but argued that an order based on an improperly promulgated rule was necessarily invalid and could not be upheld.

have fairly balanced the competing policy considerations which have been the focus of Congressional hearings for over 15 years. Surely, neither Petitioners nor the DNC purported to offer the Commission the perspectives and experiences that have been shared by the numerous and diverse local, state and national candidates and parties in our political system, and which the Commission chose to ignore when it refused to engage in public notice of and invitation to comment upon its action.

In light of the fact that the Court of Appeals decision conflicts with and misapplies principles relating to the Administrative Procedure Act which have been set forth by this Court, and which are particularly appropriate in a case with such broad ramifications, the decision should be reviewed and reversed. The upcoming elections make it especially important that this case be heard and decided as soon as possible.

Respectfully submitted,

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